whose behalf the act or transaction is done or entered into, is such as to show that he intends to adopt or recognise such act or transaction in whole or in part; and in the case of an agent exceeding his authority, may be implied from the mere silence or acquiescence of the principal."

In the present case there is no direct evidence to show that Mohamed Isa or Habsah binti Mohamed Amin has at any time either before or after the grant of letters of administration expressly authorised the defendant to occupy the said land. There is also no direct evidence that they have appointed Mohamed Junid as their agent in the transaction entered into between Mohamed Junid and the defendant or that this transaction was subsequently expressly ratified by any of them. Moreover, in my view, the subsequent acts and conduct of Mohamed Isa after the grant of the letters of administration clearly prove that he intended to take action against all the unlawful occupants of said land. Nor can it therefore be said that from the conduct of Mohamed Isa it can be inferred that he had ratified the transaction entered into by Mohamed Junid with the defendant.

Therefore, on the balance of probabilities, I find that the defendant has failed to discharge the burden of proof on the 1st issue.

On the 2nd issue this is what *Halsbury's* Laws of England, Volume 15 para 449 page 241 has to say:—

"Mere silence or inaction is not, in the absence of a duty to speak, such conduct as amounts to representation. If a person's consent to a particular act is required, he may be under a duty, when he knows that it has been done without his consent, not to stand by for so long that others are induced thereby to do that from which otherwise they might have abstained; and he cannot afterwards question the legality of the act, to the prejudice of those who have so given faith to the fair inference to be drawn from his conduct."

In order for the defendant to succeed on the 2nd issue he has to show that there was a duty on the part of Mohamed Isa to speak and he failed to speak.

The defendant in his evidence did say that when his six houses were being constructed, Mohamed Isa visited the site on 4 or 5 occasions but did not speak to him or tell him that he was building houses on the said land without authority. Moreover the defendant said that on another occasion when Mohamed Isa came to nail the number plates on the doors of his houses Mohamed Isa told him that he was the person who was in authority over the said land and when the defendant told him that he had been paying ground rent in the past to Mohamed Junid and if he should now make the payments to Mohamed Isa, Mohamed Isa's reply was that he could continue to pay to Mohamed Junid.

Mohamed Isa on the other hand denied that he saw the defendant before or that he saw the defendant's houses under construction. He also denied that he told the defendant that he could continue paying the ground rent to Mohamed Junid. As Mohamed Isa had already been granted letters of administration when he went to nail the number plates to the houses on the said land and he was then not on good terms with Mohamed Junid it is therefore unlikely that he would have told the defendant to continue paying the ground rent to Mohamed Junid. In fact according to Mohamed Isa he was not aware that Mohamed Junid was collecting ground rents from the defendant. Further, there is no evidence that the payments made by the defendant to Mohamed Junid have been paid to the estate account.

In the case of *Greenwood* v. *Martin's Bank* [4] the head notes under "Held" reads as follows:—

"*Held*, that the plaintiff owed a duty to the defendants to disclose the forgeries when he became aware of them and so enable the defendants to take steps towards recovering the money wrongfully paid on the forged cheques; . . ."

Clearly there is no such duty in the present case on the part of Mohamed Isa to speak. If the defendant has suffered any loss he has his remedy against Mohamed Junid as the law does not bar him from taking action against Mohamed Junid unlike the case of *Greenwood* v. *Martin's Bank* where the bank was left without any remedy.

The cases of *Jones Brothers (Holloway) Limited* v. *Woodhouse* [5] and *Fung Kai Sun* v. *Chan Fui Hing & Ors.* [6] also show that there is a duty to speak only when one party is aware of the deception practised by another.

In the present case Mohamed Isa did not know that the defendant was paying any ground rent to Mohamed Junid. In the circumstances there was no duty on the part of Mohamed Isa to give any notice to the defendant. Therefore the defendant also fails on the 2nd issue. The present unfortunate circumstances have been due to the negligence of the defendant to make proper enquiries for which he has only himself to blame.

In the light of these circumstances I entered judgment in favour of the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Shook Lin & Bok; Heng, Chen & Co.*

NYALONG v. THE SUPERINTENDENT OF LANDS & SURVEYS 2ND DIVISION, SIMANGGANG

[O.C.J. (Silke J.) May 31, 1967]

[Kuching — Civil Suit No. K. 12 of 1966]

Dayak Customary Law — "Berimba" land — "Temuda" rights — Inheritable rights — Claimant

having no dealings with land for over 15 years — Whether abandonment of customary rights.

The plaintiff sought for a declaration that he was the lawful rightful owner of a piece of land under customary right "by virtue that the first person to *berimba* the jungle and farm the land was his father followed by himself and his family." During the course of the proceedings the original claim was amended to add two alternative claims namely a claim that he acquired the land in his own right by the clearing of the jungle and cultivation by himself and a further claim that he had acquired in his own right by customary tenure that portion of the land which he had cleared and cultivated himself.

The defendant denied the claim (i) on the ground that the plaintiff's father was a Chinese by race, (ii) that both the father and the plaintiff moved away from the district thus losing all rights, (iii) that the land had been abandoned by the plaintiff for a period of over 15 years and thus he had lost all rights, and (iv) that the land was never in fact cleared at all.

The evidence was to the effect that sometime prior to the Japanese occupation his father, whom the plaintiff admitted to having had a Chinese father and an Iban mother, cleared a portion of the land in question. After his father's death the plaintiff with the help of some friends and neighbours cleared the rest of the land and *padi* was planted twice producing two harvests. At that time he was living in Kampong Skra about 1½ hours from the land by boat. From then on until 5 years ago the plaintiff said he did nothing to the land but visited it on many occasions just to look at it. There was evidence that for years past the said land have been used by the people of the area as common land from which wood for building purposes had been gathered and also for firewood.

Held: the culminating and decisive factor in this case was the non user of the land for a period of over 20 years by the plaintiff. By having no dealings with the land for a period of 20 years and allowing without objection the user of others of the land the plaintiff had abandoned any customary rights which he might have acquired by himself or in any other manner over the land.

Per Curiam: The basis of *temuda* rights by a single family over land is based on the fact of the family belonging to the community and on the continuous occupation of that land. When occupation ceases the family may have a "preference" against other people over the land but if it makes no attempt to exercise any right at all over the land and allows, either by default or by acquiescence other persons or a community different to its own to use the land then that family loses any rights it may have had over the land.

Cases referred to:—

(1) *Udin anak Lampon* v. *Thuai Rumah Utom* [1949] S.C.R. 3.

(2) *Keteng bin Haji Li* v. *Tua Kampong Suhaili* [1951] S.C.R. 9.

(3) *Sigip anak Majan* v. *R.* an unreported Criminal Appeal No. 26/54.

CIVIL SUIT.

Plaintiff absent by leave.

Abernethy for the respondent.

Cur. Adv. Vult.

Silke J.: This is a claim by the plaintiff, Nyalong anak Bungan, for a declaration that the plaintiff is the lawful rightful owner of that parcel of land situate at Simanggang/Serian Road containing an area of eight acres more or less, under customary right "by virtue that the first person to *'berimba'* the jungle and farm the land was his father Bungan anak Awan followed by himself and his family".

During the course of the proceedings the original claim was amended to add two alternative claims namely a claim that he had acquired the land in his own right by the clearing of the jungle and cultivation by himself and a further claim that he had acquired in his own right by customary tenure that portion of the land which he had cleared and cultivated himself.

The defendant denies the claim firstly on the grounds that the father of the plaintiff was Chinese by race, secondly that both the father and the plaintiff moved away from the district thus losing all rights, thirdly that the land has been abandoned by the plaintiff for a period of over 15 years and that he has thus lost all rights and, finally, that the land was never in fact cleared at all.

The somewhat confused evidence of the plaintiff, he was unrepresented, was to the effect that sometime prior to the Japanese occupation his father, Bungan anak Awan, whom he admits to having had a Chinese father and an Iban mother, cleared a portion of the land in question. It is not in dispute that the land is that portion marked in pink and shown on map reference W56-2-14 produced by the defendant. Having cleared a portion he then died. After his death the plaintiff with the help of some friends and neighbours cleared the rest of the land and *padi* was planted twice producing two harvests. This again was all prior to the Japanese occupation. At the time he planted he was living in Kampong Skra about 1½ hours from the land by boat. The land itself is at Kampong Gamang which is within the jurisdiction of a different Pengulu from the Pengulu at Kampong Skra.

From then on until about five years ago the plaintiff says he did nothing to the land but visited it on many occasions just to look at it.

It is quite clear from the evidence of other of his witnesses that the plaintiff's father was a Chinese and was looked upon as such until he was adopted by Pengulu Sidu at Kampong Tarok and married an Iban wife. It also appears from the evidence of the witnesses, in particular Ugah anak Bansi a very old man and previously Tuai Rumah at Kampong Skra, that plaintiff's father was at Kampong Tarok when, if at all, the land was cleared and that it was only after this that the plaintiff moved to Kampong Skra and from there went to Kampong Gemang to continue to clear the land. I am in no doubt, despite the evidence of the defence witnesses, that some of the land in dispute was cleared by Bungan and some cleared and planted by the plaintiff. I am in considerable doubt however if the entire

eight acres were cleared and planted. Eight acres of *padi* is a very considerable area and one which would be well known to people living in the area. I think the truth of the matter is that some small portion was cleared and planted and that it is possible, this being over twenty years ago, memories of it are somewhat dim.

Further from the evidence produced by the defence I am satisfied that for years past this land has been used by the people of the area as common land from which wood for building purposes has been gathered and also for firewood.

Prior to the Japanese occupation section 9 of the Land Ordinance (Cap. 81) did not exist and the position was governed by Order L-2 of 1931, sections 90 and 91, which defined "Native" as being persons belonging to the tribes listed as Native in Schedule B to Order L-2. That the father of the plaintiff became identified with and subject to the Native system of personal law then existing within the jurisdiction of Pengulu Sidu when the Pengulu adopted him I find to be fact. But pre 1st January 1958 — the date of commencement Cap. 81 — this would appear not to permit him under the land laws to raise customary rights by *'berimba'* of the land.

Further even if such rights could have been raised the decision in *Udin anak Lampon* v. *Tuai Rumah Utom*,[1] contained in the compendium Volume 1928-41, 1946-51 of the Reports, where it was held that: the Order of the Rajah dated 10th August 1899, declaring that any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district nor may he prevent others farming thereon unless he holds such land under a 'grant', to be declaratory of customary law would be against the plaintiff in the circumstances here claiming by virtue of inheritance. He did after the first clearing by his father of the land move out of the district into the jurisdiction of another *pengulu* and there was no grant.

The culminating and in my view decisive factor in this case is the non user of the land for a period of over twenty years by the plaintiff. Pengulu Geringan who was called as a witness by the plaintiff said in evidence that abandonment for a period of ten years meant loss of *temuda* rights on the logical basis that after 10 years the land had reverted to virgin jungle and was there for whomsoever recleared it. Here having left the district in which his father had *'berimba'* land the plaintiff returned and created at a later stage, he says *temuda* rights by his own actions and he then failed to deal with the land and over which communal rights have been exercised, without opposition, for a period of twenty years by persons resident in the Gamang district.

The whole basis of *temuda* rights by a single family over land appears to me to be based on the fact of the family belonging to the community and on the continuous occupation of that land. When occupation ceases the family may have a 'preference' against other people over the land but if it makes no attempt to exercise any right at all over the land and allows, either by default or by acquiescence, other persons or a community different to its own to use the land then that family loses any rights it may have had over the land. This land has not been cultivated for 20 years by the plaintiff: the community in Simanggang in general and Kampong Gamang in particular have collected timber for building and for firewood from the land without let or hindrance from the plaintiff. The right which the plaintiff may have created by his original clearing and cultivation is a restricted one and it can be lost by abandonment.

It must be remembered that a person can be said to own land only if there is a land office title subsisting in the land and if no such title exists the occupier is a mere licencee of Crown land.

In *Keteng bin Haji Li* v. *Tua Kampong Suhaili*.[2] His honour judge Digby said "If a person abandons his legitimate occupation of such land he does so at his peril". That case was not of the same nature as the present one but I think the principle to remain.

Further in *Sigip anak Majan* v. *R.*[3] an unreported Criminal Appeal No. 26/54, where the appellant had been convicted of mischief in that he and other members of Kampong Petag had felled the *'jerambe'* or secondary jungle which was claimed by the inhabitants of Kampong Rituli to be *jerambe* over which they have farming rights, Lascells J. said in the course of his judgment dismissing the appeal against conviction, that the court could take judicial notice of the effect of felling *jerambe* and that the value of the land, in farming dry *padi*, lies in the growth on the land and the longer the jungle is allowed to grow the better the land becomes for the purpose of farming. And again "the question of when *jerambe* can be considered to have been abandoned is in my opinion governed by the common law" — the common law being the common law of Sarawak. The learned judge went on to mention cases in which he had dealt tracing inheritable rights back as far as 1889.

Here Nyalong might have acquired inheritable rights over that portion of the secondary jungle cleared by his father had he not moved to another jurisdiction after his father's death. He did gain rights in his own name to that portion which he himself cleared — as I have said I do not accept that this was the whole eight acres — but by having no dealings with the land for a period of twenty years and allow-

ing without objection the user of others of the land I hold that he abandoned any customary rights which he may have acquired either by himself or in any other manner over the land.

For this reason I refuse the declarations asked for and dismiss the plaintiff's claim with costs which I assess at $75.

Claim dismissed.

LOH THYE CHOON v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) June 6, 1967]

[K.L. — Criminal Appeal No. 36 of 1967]

Penal Code, s. 304A — Causing death by negligent act — Charge — Not necessary to give particulars in — Post-mortem report in the absence of other evidence did not state death caused by accident — Charge unproved — Criminal Procedure Code (Cap. 6), ss. 332 and 340.

The appellant in this case was charged with an offence under section 34A of the Road Traffic Ordinance, 1958. At the end of the case for the prosecution the charge was amended to one under section 304A of the Penal Code. The appellant was found guilty and was convicted and fined a sum of $1,000 in default six months imprisonment and disqualified from driving for a period of twelve months. Against this decision the appellant appealed.

The first ground of appeal was that as the amended charge did not contain particulars of negligence it was bad in law and the conviction could not therefore be sustained. The second ground of appeal related to the admission of post-mortem report. It was urged that sections 332 and 340 of the Criminal Procedure Code had no application to the circumstances of this case and had that evidence been rejected, as it should have been, there was no evidence as to the cause of death. For reasons best known to the prosecution, the pathologist was not called to give evidence at the trial.

Held: (1) it was not necessary that the particulars of alleged negligence be stated in the charge;

(2) on the assumption that the medical report was properly admitted it cannot be said that the essential ingredients that the death of the deceased was the direct result of the negligent act of the appellant had been proved to the hilt.

Cases referred to:—

(1) *Public Prosecutor* v. *Ahmad bin Din* [1956] M.L.J. 235.

(2) *Public Prosecutor* v. *Marimuthu* (K.L. Criminal Appeal No. 43 of 1961. unreported).

(3) *Todrick* v. *Dennelar* (1905), 42 Sc. L.R. 199.

(4) *Kurban Hussein* v. *State of Mahrashtra* [1965] 2 S.C.R. 622; A.I.R. 1965 S.C. 1616.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Hashim bin Majid (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: The appellant was charged with an offence under section 34A of the Road Traffic Ordinance, 1958. At the end of the case for the prosecution the charge was amended to one under section 304A of the Penal Code. He was found guilty and was convicted and fined a sum of $1,000 in default six months' imprisonment and disqualified from driving for a period of twelve months. The amended charge read:—

"That you on or about 20.1.1965 at about 5.45 p.m. at Jalan Birch, in the District of Kuala Lumpur, being the driver of motor-lorry N.B. 1596 did cause the death of one Low Chuen alias Liew Chuen, by doing a negligent act not amounting to culpable homicide and thereby committed an offence punishable under section 304A of the Penal Code".

At the hearing the following facts were proved. On 20th January, 1965 at about 5.45 p.m. the deceased was riding a scooter with a pillion rider along Birch Road and was heading towards Merdeka Circle from the direction of Edinburgh Circle. A lorry driven by the defendant emerged from a row of shop-houses on the (deceased's) left and cut across the path of the on-coming scooter. The lorry intended to cross to the other side of Birch Road. A collision occurred between the two vehicles and both the deceased and his pillion rider were thrown on to the road. The deceased was admitted to hospital and died eight days later. The scene of the accident is a straight stretch of road 49 feet wide and there is a white dividing line in the centre. The length of the lorry was 25 feet — slightly more than one-half of the width of the road. The weather was good and the road dry. There were no marks on the road.

I can dispose summarily of the appellant's first submission that as the amended charge contained no particulars of negligence it is bad in law and a conviction cannot therefore be sustained. The essence of the charge is the negligent driving and it is not either usual or necessary to particularise the alleged negligence in the charge. I need hardly say that in arriving at this decision I am adopting the principle laid down in *Public Prosecutor* v. *Ahmad bin Din* (1) which was followed in *Public Prosecutor* v. *S. Marimuthu.*(2) In the United Kingdom the same principle would seem to apply (see footnote (h) in Vol. 2, *Stone's* Justices' Manual, 1965, at p. 2333 where the case of *Todrick* v. *Dennelar* (3) is mentioned).

The second ground of appeal relates to the admission of the post-mortem report. It is said that the provisions of section 332 and section 340 of the Criminal Procedure Code have no application to the circumstances of this case and had that evidence been rejected, as it should have been, there is no evidence as to the cause of death. For reasons best known to the prosecution, the pathologist was not called to give evidence at the trial. In the view which I take of this case it is not necessary to express any opinion on this point. On the assumption that the medical report was properly admitted it cannot be said that the essential ingredient that